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Supreme Court, U.S.
FILED

09-691 DEC 9 - 2009

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Supreme Court of the United States

BRYAN EPIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is summary reversal warranted where an appellate court makes findings of fact on a contested issue on which the district court heard testimony but refused to make formal findings of fact?

2. Does the district court have jurisdiction to address prosecutorial misconduct – false testimony by government agents at trial – when proof that the agents knowingly testified falsely is revealed during hearings before the district court in a mid-appeal remand?

3. Was a new trial required under Fed. R. Ev. 106 when the district court refused to admit the larger document to dispel the agents' false testimony about a fragment (spreadsheets) from that document?

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the following parties have appeared in the Ninth Circuit Court of Appeals in this matter:

Bryan Epis (Petitioner/Appellant)

United States of America (Respondent/Appellee)

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Bryan Epis, prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

On April 8, 2009, the Ninth Circuit affirmed Epis' conviction and sentence in an unpublished opinion. *United States v. Epis,* 324 Fed. Appx. 560 (9th Cir. 2009). App. 14-25. On August 11, 2009, the Ninth Circuit denied Epis' petition for rehearing or rehearing en banc, but issued an Amended Memorandum and Amended Order. *United States v. Epis,* 2009 U.S. App. LEXIS 17833 (9th Cir. 2009). App. 1-13.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals, denying rehearing and rehearing en banc was issued August 11, 2009. On October 30, 2009, application 09A394 was granted by Justice Anthony M. Kennedy extending the time to file a writ of certiorari until December 9, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions at issue are the Fifth and Sixth Amendments to the United States Constitution. *See* U.S. Const. Amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law"); U.S. Const. Amend. VI ("the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State").

STATEMENT OF THE CASE

Bryan Epis was the first California medical marijuana patient/grower prosecuted by the federal government for growing medical marijuana under California's Compassionate Use Act, Cal. H&S § 11362.5 ("CUA"), which legalized the cultivation and use of medical marijuana by patients with doctors' recommendations. On June 25, 1997 – just seven months after the CUA took effect – agents raided Epis' home in Chico, California and found 458 small marijuana plants[1] in various stages of maturity growing in Epis' 15' X 15' basement.

The trial was highly controversial. Protesters picketed the courthouse during trial, angering the

[1] At maturity the plants were 11 inches in diameter, and between one and two feet high, and according to Agent Redmond, only produced ½ ounce of smokeable material each. Nine plants were dead, and 169 were seedlings, half of which would be discarded as male plants.

judge. Epis was represented at trial by the flamboyant defense lawyer J. Tony Serra, attracting further public attention.

The district judge ruled *in limine* that medical marijuana evidence would not be allowed, and went to great lengths to bar the defense from mentioning the CUA or using the terms "patient" or "medical marijuana." However, the government elicited testimony from Agent Redmond about encountering Epis while Epis was doing volunteer work at the Chico, California medical marijuana dispensary, and other testimony about the Chico dispensary that aided the government's cause. The trial judge instructed the jury that compliance with the CUA was not a defense. The curtailment of medical marijuana issues is not challenged here.

In this high-profile and highly-charged atmosphere, two law enforcement agents and the federal prosecutor decided to hedge their bets – by cheating. They took an Excel spreadsheet – which they knew was part of Epis' unfinished draft proposal for a non-profit organization to run a licensed medical marijuana dispensary in Silicon Valley – and pretended the spreadsheet represented the actual or projected figures Epis expected from his marijuana grow in Chico (200 miles from Silicon Valley). Neither the agents nor the prosecutor informed the court that the spreadsheets were part of this larger document, which they had seized from Epis' computer.

The prosecution gambled that the defense would be blind-sided by their ruse. Thousands of pages of documents were turned over in discovery by the government. Some were seized in hard copy from Epis' house; thousands more were printed out by police from Epis' computer. Epis was a law student, and a prolific writer of notes and ideas which he often abandoned after drafting ("doodling") on his computer. Five years elapsed between Epis' arrest and his trial, and the prosecution guessed correctly that the defense would not recognize the source of the spreadsheet.

The prosecutor referred to the spreadsheet and another excerpt from the same document in his opening statement when he proclaimed: "the most damaging evidence against Epis is a business plan showing that he anticipated increased weekly sales of marijuana" and expected to net $1,856,000 per week from his grow operation by January 1998.

The court admitted the Excel spreadsheets (Exhibit 27) over defense objection. App. 47-49. The prosecutor called DEA lead case agent Mancini and agent Richmond, who testified for hours with the spreadsheets displayed on the overhead projector, giving their expert opinions that the figures represented actual or expected profits from Epis' Chico basement grow. The two agents testified in the present or past tense, as if the figures were actually realized. Such testimony continued well past June 25, 1997 – when agents shut down Epis' grow. For example, Mancini testified the figures in the

"Gross/wk" column indicated that by January 2008 "he's netting $1,856,000 per week." The prosecutor encouraged this, sometimes asking the agents leading questions in the present tense: ("So for instance, in August 1997, he has 3200 customers. Is that correct?").

A careful look at the spreadsheets shows they could not pertain to Epis' 15' X 15' Chico grow.[2] The spreadsheet's figures increase tenfold in the first ten days, jumping from 20 "members" in the row for "March 21, 1997" to 200 members for April 1, 1997, and then doubled every month thereafter, with a completely impossible figure of 100,000 members in January 1998. The spreadsheet's figures for June 1, 1997, 24 days before the raid, listed 800 members and 200 ounces per week in the "amount smoked" column and for July 1, 1997 – just 6 days after the raid – showed 1600 members and 400 ounces per week in the "amount smoked" column. The raid on June 25, 1997 turned up only 458 small indoor plants in varying stages from newly rooted to mature plants, and had 5 people growing together. According to Agent Redmond, at maturity these plants would produce a half ounce each. As he stated at trial: "For instance, where it says 200 ounces of smokeable material . . . equates to approximately 400 plants if

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[2] The spreadsheet's columns showed it pertained to a medical marijuana dispensary – with categories for "members" and "baked goods." There was no evidence of any baked goods found during the search of Epis' house.

you are looking at one square foot per plant." The government presented no evidence of any other marijuana cultivation or related activities by Epis that would account for these outrageous figures.

Blind-sided by these exhibits, the defense was at a loss to contain the damage. The government introduced only the spreadsheets (Exhibit 27) during the agents' testimony. When Epis testified in his own defense, the prosecutor introduced a different two-page excerpt from the Silicon Valley proposal (Exhibit 38) – again without identifying it as part of the larger Silicon Valley proposal – and cross-examined Epis about it. He asked Epis "[n]ow is Exhibit 27 part of a marketing plan that you designed?"[3] At first Epis was stumped, but after seeing Exhibit 38, he began to recall the source of both documents. That evening he searched his records and found most of the pages from his Silicon Valley draft proposal. He took the document to court the next day to show that the government's exhibits were fragments of an irrelevant document, taken out of context. The defense proffered it as Trial Exhibit A, but the judge refused to admit it, ruling: "I'm not going to allow the jury to read all about what the city council of San Jose or other cities are doing with marijuana clubs." App. 44-46. Epis' attorney told the district judge he believed the complete Silicon Valley proposal was among the

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[3] This shows the prosecutor knew the spreadsheets were part of the larger document, for the words "marketing plan" appear on Exhibit 38 but not Exhibit 27.

documents the government had printed out from Epis' computer and turned over in discovery, and was in the process of asking for a recess to retrieve it. The prosecutor adamantly insisted that defense counsel was wrong, stating the two government exhibits (27 and 38) were hard copy documents seized from Epis' home, and that they were surrounded by unrelated documents in the government's discovery materials.[4] Epis' trial lawyer took the prosecutor's word and withdrew his request for a recess to fetch the complete document from the discovery materials.

More evidence of misconduct began to surface during the appeal. The marked copy of Defense Exhibit A had somehow disappeared from the court's record. When Epis' appellate counsel included what she thought was an unmarked copy of Exhibit A in her excerpts of record, the prosecutor claimed it was not Defense Exhibit A, and moved for a Fed. R. App. P. Rule 10(e) hearing in the district court to determine what Defense Exhibit A really was. At the Rule 10(e) hearing the district court certified the government's proffered copy of Exhibit A – the Silicon Valley proposal, missing three pages, with the pages in perfectly scrambled order. To avoid testimony by

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[4] It may have been true that the fragments that became the government documents were seized in hard copy from Epis' home. They were indeed turned over in discovery in the stated order, but as the defense later learned, the entire Silicon Valley draft proposal was also turned over in discovery just 25 pages away from Exhibit 38 and 100 pages away from Exhibit 27.

the AUSA who turned over the document in discovery, the trial prosecutor stipulated that the complete Silicon Valley proposal had in fact been printed off Epis' computer and turned over by the government in discovery.

In mid June of 2004, the Ninth Circuit heard oral argument in Epis' case. Four weeks later, without ruling on any issues, the panel remanded the case mid-appeal to await the outcome of *Gonzalez v. Raich*, 545 U.S. 1 (2005) and for resentencing pursuant to "extant law." App. 27-29. Two weeks later, the panel granted Epis' bail motion and released him after serving 25½ months on a 10-year mandatory minimum sentence. App. 26.

When this Court reversed the Ninth Circuit's ruling in *Gonzalez v. Raich*, the district court proceedings against Epis resumed.

The updated presentence report continued to rely on Exhibits 27 and 38 in proving the 1,000 plant threshold. In his objections to the presentence report, Epis demanded an evidentiary hearing into whether the government agents knowingly testified falsely about Exhibit 27. In preparation for the anticipated hearing, defense counsel asked to inspect all of the physical evidence seized from Epis' house. The defense suspected, among other things,[5] that the

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[5] The defense also believed the agents' trial testimony had exaggerated or omitted key facts about seized physical evidence

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agents might have altered the data file seized from Epis' computer to create the exponentially increasing figures in Exhibit 27, or manipulated page breaks in the word processing document to make it print out just the fragment that the government introduced as Exhibit 38.[6] DEA reports showed the DEA backed up Epis' computer onto an external hard drive before returning Epis' computer, which was no longer functional, and the defense particularly wanted to see the external hard drive.

At a hearing on December 5, 2005, the prosecutor revealed that the government had destroyed all of the evidence seized from Epis. The trial judge was livid. Promising discovery and an evidentiary hearing into the destruction of the evidence, he first asked the government to submit declarations detailing why the evidence was destroyed with the case still pending. The government submitted affidavits detailing four far-fetched scenarios which defied DEA regulations on the safeguarding and retention of evidence.[7] Before

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in their trial testimony, all geared to achieving the 1,000 plant threshold (triggering the 10-year mandatory minimum).

[6] Government Exhibit 38 was wholly contained within the complete Silicon Valley proposal in the document taken from Epis' hard drive, but the page breaks in the discovery version of that document did not coincide with the page breaks of Exhibit 38. There was no separate stand-alone document on Epis' hard drive which contained only the fragment that became Exhibit 38 and none of the surrounding text.

[7] For example, one affidavit claimed the grow equipment seized from Epis' home by DEA, executing a federal search warrant, was stored in an outdoor fenced lot at the Butte County

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the defense could pursue discovery or obtain an evidentiary hearing, however, the prosecutor filed a motion arguing the district judge lacked jurisdiction because it was beyond the scope of remand. In response, the court denied all hearings into prosecutorial misconduct and set a re-sentencing date. App. 32-43.

In preparation for re-sentencing, Epis participated in a safety valve debriefing. During the debriefing, the prosecutor questioned Epis about Exhibits 27 and 38. The prosecutor asked: "what is the background to this document [Exhibit 27]?" Epis replied: "You know what this is, it's an Excel spreadsheet that was embedded into that San Jose proposal. . . . Exhibit 38A, 38B, 27, its all part of the Silicon Valley proposal. Which had nothing at all to do with Chico." The prosecutor filed a sentencing memorandum arguing that was a false statement made during the safety valve debriefing, disqualifying Epis from the safety valve.

In a bold and surprising move, the prosecutor asked for an evidentiary hearing into whether Epis lied about his claims of false testimony by government agents regarding Exhibit 27.

Sheriff's Office for several years, until the evidence tags were rendered unreadable by the elements and it was discarded. The Butte County Sheriff's office had no record of accepting custody, however.

The court granted the government's request for an evidentiary hearing, but limited questioning to whether Epis lied in alleging misconduct. Although this allowed Epis to elicit testimony from the agents about what they knew about the documents, the upside down nature of the evidentiary hearing denied Epis a full and fair opportunity to prove prosecutorial misconduct.[8] However, enough damning evidence came out during the evidentiary hearing to call into question the validity of the jury verdict on Count 1 (conspiracy to cultivate more than 1,000 plants within 1,000 feet of a school), as well as the sentencing guideline range as to Count 3.

The evidentiary hearings proved Epis was telling the truth: Exhibits 27 and 38A-B were excerpts of the Silicon Valley proposal and did not relate to Epis' Chico grow at all. During cross-examination, both agents admitted familiarity with the draft Silicon Valley proposal, and acknowledged the data in the spreadsheets was identical to that in Exhibit 27. Agent Mancini – the lead case agent, who sat at counsel table throughout trial – admitted knowing before trial that the data in the spreadsheets was identical, but could not recall whether he told the prosecutor. Mancini admitted that the government

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[8] Evidence of bad faith or the prosecutor's knowledge of the falsity of the agents' testimony was not relevant to the question of whether Epis lied about the agent's false testimony. The judge scrupulously limited questioning to evidence probative of whether Epis lied.

had no evidence that Epis had followed through on the Silicon Valley proposal. He had not checked to see whether Epis had filed the draft articles of incorporation contained in the draft proposal. It did not matter to him, he said.

During the evidentiary hearing, Agent Redmond could not explain why expenses in the spreadsheet stayed constant while production figures doubled monthly. When asked whether the electricity costs in the spreadsheet would support an indoor grow producing the volumes in the spreadsheet, Redmond replied: "No. But I don't know if these numbers are for his house, CMMC, or for some other thing." Years after the trial, Agent Redmond admitted that the volume of marijuana in the spreadsheet could not have been grown in Epis' indoor garden. Questioned by the judge, Redmond admitted that "it would have had to have expanded outside the house in Chico because of the sheer volume of marijuana" listed in the spreadsheet. During the resentencing evidentiary hearing the prosecutor said the figures showed Epis "was going to start off in Chico" and "expand his operation to . . . Silicon Valley." "He was going to accomplish this in multiple locations."[9] However, the government never presented those theories at trial – nor could they, because Count 1 charged conspiracy to

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[9] The problem with this theory is that Count 1 required that the 1,000 plants be grown within 1,000 feet of a school. There is no way to prove that these theoretical "multiple locations" would be located within 1,000 feet of a school.

manufacture 1,000 plants *within 1,000 feet of a school*. Some other location would not suffice. At trial, the two agents had testified at length – and very emphatically – that the spreadsheets represented what Epis was actually making or expected to make from cultivating marijuana at his home in Chico.

During the hearing, the court appeared incredulous that the government was still claiming that Exhibit 27 related to the Chico grow. "This plan had nothing [to] do with what happened in Chico," the Court stated. Indeed, when the prosecutor claimed at the evidentiary hearing that the spreadsheets' figures corresponded at the time of the raid, the district judge scoffed at the idea, saying: "Okay. Now that would interest me. That means we have 800 members, 200 ounces a week, 40,000 a week. Is that consistent with what was found in the Chico basement?". When agent Redmond couldn't answer the question, the Court said "According to the government, Mr. Epis lied when he related this document [doesn't pertain] to Chico. It's incumbent for you to establish this document does relate to Chico. We're not getting there."

However, the district judge staunchly refused to rule on whether the agents testified falsely regarding Exhibit 27 or whether Epis lied about that during the safety valve debriefing. App. 31. The court avoided the issue by ruling that Epis was not entirely truthful at the debriefing about "the role of Mr. Dusek, failure to recall."

On the "comeback" appeal, the panel dispensed with oral argument and affirmed Epis' conviction in an unpublished Memorandum Opinion. Judge Rawlinson filed a separate concurrence, stating: "I concur with the result."

The original Memorandum purportedly affirmed a ruling of the district judge on the prosecutorial misconduct issue:

> [i]t was not an abuse of discretion for the district court to find that the prosecutor did not solicit or allow to go uncorrected any false testimony related to the spreadsheet.

United States v. Epis, 324 Fed. Appx. 560, 563-64 (2009). App. 18. However, the district judge had denied evidentiary hearings into the misconduct, and refused to make any rulings on the issue, stating it was beyond the scope of the remand. See App. 30; 32-43. Even after the prosecutor obtained an evidentiary hearing, during which clear evidence of the misconduct was elicited, the judge refused to rule on whether the agents lied about Exhibits 27 and 38A-B. At re-sentencing the prosecutor pressured the judge for a ruling on this issue, saying "[i]t impacts on whether Exhibit 27 was misused by the prosecution" but the judge refused, saying "let the Ninth Circuit sort that out. I'll not make that finding." See App. 31.

Epis petitioned for rehearing, pointing out that the district judge never ruled on the misconduct

issues, among other factual errors in the Memorandum.[10] The panel denied rehearing but issued an unpublished Amended Memorandum Opinion which removed the language purporting to affirm the district judge – but replaced it with the appellate court's own findings of fact:

> Epis has not introduced adequate evidence to support his contention that the prosecutor solicited or knowingly allowed to go uncorrected any false testimony. . . .

2009 U.S. App. LEXIS 17833 (2009) at *4. App. 4.

> The two federal agents testified that they believed Exhibit 27 pertained to Epis's existing operation because it was found at the location of Epis's marijuana operation and its initial dates and capacity projections corresponded, at least approximately, with the capacity of Epis's operation at the time the law enforcement shut it down. Although they admitted that Epis's projections were "optimistic" and that the plan might have eventually entailed an expansion beyond Epis's home, the agents continued to believe that Exhibit 27 pertained to Epis's existing operation even after hearing both of Epis's alternative explanations of the document. The prosecutor did not commit misconduct

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[10] The Memorandum Opinion also claimed the false testimony happened at an evidentiary hearing, rather than during the jury trial. App. 17.

> by soliciting this reasonable opinion testimony.

Id. at *5-6. App. 5-6.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit panel improperly made findings of fact, requiring summary reversal under *Icicle Seafoods*

In the absence of a ruling from the district court on the prosecutorial misconduct issues, the appellate panel improperly made its own findings of fact. It purported to weigh the evidence:

> Epis has not introduced adequate evidence to support his contention that the prosecutor solicited or knowingly allowed to go uncorrected any false testimony. . . .

2009 U.S. App. LEXIS 17833 (2009) at *4. App. 4. However, the record shows the district judge denied Epis a full and fair opportunity to present evidence "that the prosecutor solicited or knowingly allowed the false testimony to go uncorrected" – nor did it make findings of fact on the issue.

During the safety valve evidentiary hearing, the district judge scrupulously restricted examination to the issue of whether Epis lied at the debriefing, precluding the defense from eliciting testimony about what the prosecutor knew. Certainly Epis did not get a full and fair opportunity to prove prosecutorial

misconduct during the hearing. See *Townsend v. Sain*, 372 U.S. 293, 313-14 (1963) ("There cannot even be the semblance of a full and fair hearing unless the [trial] court actually reached and decided the issues of fact tendered by the defendant.").

In its Amended Memorandum the panel again got the facts wrong. It erroneously claimed the spreadsheets' "initial dates and capacity projections corresponded, at least approximately, with the capacity of Epis's operation at the time the law enforcement shut it down." App. 5. This is belied by the record.[11]

The Amended Memorandum credited the agents' testimony at the safety valve hearing that the figures in the spreadsheet "were 'optimistic' and that the plan might have eventually entailed an expansion beyond Epis's home" – however, there was no evidence of any expansion beyond Epis' home, and even if there was, it would not meet the criteria of Count 1, which required the cultivation to be within 1,000 feet of a school, where Epis' home happened to be located.

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[11] The basement grow had started in late December 1996 or January 1997. The spreadsheet starts March 21, 1997. Trial testimony established that, at the time of the raid (June 25, 1997), Epis and four other patients were growing together in Epis' basement. The spreadsheet lists 1600 people in the "members" column for July 1, 1997, six days after the raid.

In making its own finding of fact that "the prosecutor did not commit misconduct by soliciting this reasonable opinion testimony" the appellate panel said the agents "continued to believe that Exhibit 27 pertained to Epis's existing operation even after hearing both of Epis's alternative explanations[12] of the document." App. 5-6. The ludicrousness of such a claimed belief by seasoned drug enforcement agents is something only a district judge – capable of making determinations of credibility from having viewed their testimony – could fully appreciate. Further, the appellate panel's fact-findings ignore the agents' admissions during the safety valve hearing, which showed they knew before trial of the connection between Exhibit 27 and the Silicon Valley proposal. These serious factual errors illustrate the dangers of having an appellate panel find facts on a cold record, when they had never observed any of the witnesses' testimony.

Although the district court had invited the court of appeals to "sort it out" – an appellate panel is not permitted to make findings of fact.

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[12] What the panel characterized as Epis "alternative explanations" was Epis' initial guess when first confronted with the spreadsheet at trial – five years after the raid which resulted in the seizure of three thousand pages of documents from his home – and his subsequent recognition of its origin, after seeing Exhibit 38 refreshed his memory, prompting him to look for and find the Silicon Valley proposal from whence it came. There is nothing implausible about Epis' two explanations.

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own. As we stated in *Anderson v. Bessemer City*, 470 U.S. 564, 574-575 (1985): "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

This Court should summarily reverse and remand the case to the district judge for full evidentiary

hearings and findings of fact on the misconduct issues on which the district judge refused to rule.

II. False testimony by government agents is such a serious violation of a defendant's right to a fair trial, that a district court should be required to address it, whenever it arises during hearings before the district court

The knowing use by the prosecution of false testimony to obtain a jury verdict subverts the truth-gathering process, and undermines the integrity of the criminal justice system, in addition to violating the defendant's right to due process and a fair trial.

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction [is] implicit in any concept of ordered liberty. . . .

Napue v. Illinois, 360 U.S. 264, 269 (1959). A prosecutor's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (*per curiam*). For these reasons,

> a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the *Fourteenth Amendment*. The same result obtains when the State, although not

> soliciting false evidence, allows it to go uncorrected when it appears.

Napue v. Illinois, 360 U.S. 264, 269 (1959) (internal citations omitted).

> A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the [prosecutor] has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the [prosecutor's] silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Id. at 269-70.

A. The prosecutorial misconduct that was revealed during the safety valve evidentiary hearing was serious enough to require immediate action

The agents testimony at the safety valve evidentiary hearing showed the falsity of their trial testimony about the significance of the spreadsheets. Years after trial the lead case agent admitted knowing before trial that the data in Exhibit 27 was identical to the spreadsheets in the Silicon Valley proposal, and that there was no evidence Epis had taken steps to implement the Silicon Valley proposal. At trial, neither the prosecutor nor the two agents even mentioned that the spreadsheets were part of the larger document.

The agents' false testimony was material. It gave the jury the false impression that the spreadsheet proved Epis conspired to reap millions of dollars per week in profits from his Chico grow – a fact crucial to Count 1, conspiracy to grow 1,000 plants within 1,000 feet of a school.

As lead case agent, Mancini's knowledge is imputed to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). Additionally, it appears that the prosecutor himself was involved – both in the presentation and the coverup. His opening statement touted the spreadsheet (Exhibit 27) and "marketing plan" fragment (Exhibit 38) as "the most damaging evidence against Epis," claiming they showed Epis would be "netting $1,856,000 per week" by January 1998. In closing argument the prosecutor argued:

> And what do we have in terms of documentary evidence to show that the operation would have continued past that two-month period? We have Government's Exhibit 27 which shows a plan to market and sell marijuana until January 1st, 1998.

Prosecutors are forbidden from making arguments based on testimony known to be false. *Miller v. Pate*, 386 U.S. 1 (1967).

Rather than do his duty to correct the false testimony, the prosecutor began actively thwarting

defense attempts to expose the false testimony – beginning during the trial. When the defense came close to discovering the misconduct at trial, the prosecutor adamantly protested that the spreadsheets were stand-alone documents and convinced defense counsel that the Silicon Valley proposal was not amongst the discovery materials. Had he not misled defense counsel, Epis could have obtained a recess and obtained the complete document, which at the very least the court would have admitted under the rule of completion. More likely the court would have declared a mistrial.

The prosecutor's deception deflected defense counsel's attention before he could make the obvious conclusion that, since the government turned it over in discovery, the prosecutor must have known the spreadsheets came from that irrelevant document.

B. Criminal Rule 33(b)'s three-year deadline for filing motions for new trial based on newly discovered evidence does not apply because the misconduct was discovered and raised on direct appeal

The district judge claimed he could not address the evidence that the agents had knowingly testified falsely at trial, because "Rule 33(b)1, new trial motion time, has long expired and there was never a motion before me on that issue regarding a new trial." App. 30. Fed. R. Crim. P. Rule 33(b) – requiring motions in the district court for new trial based on newly

discovered evidence to be brought within three years of the verdict – does not apply when the false testimony issue was raised on direct appeal. Epis' original (2002) appellate brief raised the issue, and the panel never decided any issues before remanding, mid-appeal.

If Rule 33(b) placed a three year limit on discovery of prosecutorial misconduct, the unscrupulous prosecutor who solicited false testimony or allowed it to go uncorrected could just wait three years and be home free. Rule 33(b) merely places a three-year limit on a motion for new trial in district court. It does not apply to issues raised on direct appeal or in other post-conviction habeas corpus proceedings. See *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004) (rejecting the appellate court's holding that a federal habeas corpus petitioner "had documented his claims of prosecutorial misconduct too late and in the wrong forum.").

In *Cone v. Bell*, 129 S.Ct. 1769 (2009), the defendant discovered the prosecutor's falsehood ten years after his conviction, and raised it in his habeas petition. This Court reversed and "remanded to the District Court with instructions to give full consideration to the merits of Cone's *Brady* claim." 129 S.Ct. at 1786. Although this Court characterized Cone's belated discovery of the misconduct as "newly discovered evidence"[13] – clearly it was not governed by

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[13] 129 S.Ct. at 1777.

Rule 33(b), for the Court remanded to the district court for a hearing on the cumulative effect of the suppressed evidence, some 27 years after Cone's conviction.

Clearly there is no time limit on discovery of false testimony by government agents. The prosecutor has a "responsibility and duty to correct what he knows to be false and elicit the truth." *Napue v. Illinois*, 360 U.S. at 270 (1959). The ongoing nature of that duty would be illusory if a time limit existed on defense attempts to discover and prove such misconduct.

C. The district court did not lack jurisdiction to address the misconduct

Even when the safety valve hearing elicited clear evidence that the agents knew, before trial, that the spreadsheets were part of the Silicon Valley proposal, and that Epis had never implemented the proposal, the district judge refused to make findings on the agents' false depiction of fragments of that document at trial, adopting the prosecutor's argument that the district court lacked jurisdiction because it went beyond the scope of the remand.

The fact that this case was remanded mid-appeal should not have deprived the district court of *jurisdiction* to address prosecutorial misconduct that came to light during the remand. Ordinarily the pendency of a direct appeal deprives the district court of jurisdiction because the case is pending in another court. Here, the district court had jurisdiction

because the case was pending in the district court on remand.

Even when a direct appeal is pending, courts have permitted defendants to file collateral proceedings in district court when extraordinary circumstances exist. In *United States v. Taylor*, 648 F.2d 565 (9th Cir. 1981), *cert. denied*, 454 U.S. 866 (1981), the defendant filed a coram nobis petition in the district court – while his direct appeal was pending – contending that:

> the prosecuting attorney misled the trial judge and defense counsel to believe that subpoenas had been issued at trial for the "original" letter, with the result that a less reliable document was admitted.

648 F.2d at 570-71. Finding the defendant's claim "gives rise to the somber prospect that the Government committed a fraud on the court which ultimately worked a great prejudice to Taylor's case," the Ninth Circuit remanded for hearings on the coram nobis petition, even though it was filed during the pendency of the direct appeal. The court noted:

> Generally, the noting of such an appeal severely restricts the filing of a collateral claim with the District Court, to avoid any anomaly associated with the simultaneous consideration of the same case by two courts. The usual practice is to make a collateral assertion of error subsequent to the date of decision in the direct appeal. When this path is followed the risk of duplicitous and

> conflicting judicial administration is minimized, inasmuch as the disposition of the direct appeal may render the motion moot.
>
> The general rule of forebearance is not, however, a jurisdictional impediment. The District Court may entertain a collateral motion during the pendency of a direct appeal if "extraordinary circumstances" outweigh the considerations of administrative convenience and judicial economy. Hence, Taylor's prior appeal from his conviction is not an absolute bar to his concurrent coram nobis motion, though it imposes the burden upon him of proving the existence of circumstances sufficiently extraordinary to warrant dual proceedings.

Id. at 572.

Here, there is no problem with dual proceedings, nor risk of duplicitous and conflicting judicial administration. The case had gone up on appeal, but had been remanded prior to a decision. The district court had jurisdiction when the evidence of misconduct was elicited. Certainly Epis could wait until after his direct appeal was decided and file a collateral attack pursuant to 28 U.S.C. § 2255, but why should he have to do that when the case was properly before the district court when the clear evidence of the agents false trial testimony came out?

Judicial economy favors addressing verdict-tainting perjury whenever it comes to light during court proceedings, rather than remaining close

mouthed and requiring separate additional proceedings.

The district court should have delved into the issue and made findings of fact even though the evidence came out during the mid-appeal remand. As the Ninth Circuit stated in *Taylor*:

> When, as in the exceptional facts of this case, the collateral claim casts such a dark shadow on a pivotal aspect of the direct appeal and, at the same time, implicates the fundamental fairness of the trial and propriety of the Government's actions, it is our view that the concerns for justice are best served by prompt inquiry either confirming or dispelling the suspicion of irregularity raised.

648 F.2d at 572.

D. The appellate court had a duty to remand for further hearings to address the claim of verdict-tainting misconduct

Epis raised prosecutorial misconduct in his initial brief in the appellate court, on the limited record he had then. After the appellate court remanded, mid-appeal and without deciding any of the issues, additional evidence elicited during the safety valve evidentiary hearing showed the district judge

believed that – on Count 1[14] at least – the jury verdict was tainted by the agents' false testimony. The misconduct remained the central issue in Epis' post-remand "comeback" brief.

The Ninth Circuit's Memoranda made short shrift of the misconduct issues, first purporting to affirm a finding the district court never made, and then improperly making its own finding that Epis had failed to prove grounds for new trial based on the prosecutorial misconduct. The panel overlooked the fact that Epis had never been given a full and fair opportunity to prove the elements of a *Napue* violation. The additional evidence supporting the prosecutorial misconduct claim came out during a hearing in which evidence and cross-examination was limited to the question of whether Epis lied at the safety valve debriefing in claiming the agents testified falsely. The district judge avoided ruling on whether Epis lied about the prosecutorial misconduct by ruling that Epis was not fully candid about another issue "the role of Mr. Dusek, failure to recall." The district judge's spontaneous comments during the safety valve hearing shows he may well have ruled in Epis' favor on the issue had he not felt his hands were

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[14] During the bail portion of the re-sentencing hearing, the district court stated that the agents' testimony about the spreadsheets – "the issue of Exhibit A, Exhibit 27, things surrounding that issue . . . obviously affected the thousand plant growing finding by the jury. That's my surmise, and I think it's a reasonable one."

tied by the scope of the remand. Clearly, there was enough evidence in the record to require the court of appeals to remand to the district court to address the prosecutorial misconduct issues.

When evidence of verdict-tainting misconduct comes to light during direct review of a conviction, the courts have a duty to take corrective action to address it – at the earliest opportunity. In *United States v. Shotwell Manufacturing Co.*, 355 U.S. 233 (1957), after certiorari was granted, the Solicitor General filed a motion to remand based on newly discovered evidence that "the decision of the Court of Appeals was based upon a perjurious record attributable to the fraud of the respondents." *Id.* at 235. In deciding to remand, the Court looked to two earlier decisions, *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 (1956) and *Mesarosh v. United States*, 352 U.S. 1 (1956). In both cases, this Court had refused to review the decision below because of the unresolved "challenge to the integrity of the record."

> In *Communist Party* the Court remanded the case to the Board with directions to resolve the charges of taint, and to make a fresh determination on the merits, if taint were found. In *Mesarosh* the Court, believing that the record clearly demonstrated that a key government witness had been wholly discredited, took more drastic action by reversing the convictions of the petitioners

> and remanding the case to the District Court for a new trial.

355 U.S. at 240. The Court explained:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. . . . We cannot pass upon a record containing such challenged testimony. We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it.

Id. at 242, quoting *Communist Party*, at 124-25 (citation omitted).

> This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. . . . If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

Shotwell at 242, quoting *Mesarosh, supra,* at 14.

Clearly, if this Court has a duty to remand to the district court to address and resolve claims that perjured testimony tainted the record, the court of appeals had that same duty, since it "should be remedied at the earliest opportunity." Accordingly, this Court should remand to the district court for full evidentiary hearings into the prosecutorial misconduct claims.

III. Damage from the misconduct was compounded by the trial court's refusal to admit the complete document under the "rule of completeness"

At trial, once the defense discovered Government Exhibits 27 and 38 were excerpts from the Silicon Valley proposal, the defense should have been allowed to introduce the larger document to correct "the misleading impression created by taking matters out of context." Advisory Committee Notes to Fed. R. Ev. 106.

> When one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant and therefore admissible.

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988).

The government agents testified the spreadsheets showed the actual or expected yield from the

marijuana cultivation at Epis' house in Chico. Count 1 charged conspiracy to cultivate 1,000 plants within 1,000 feet of a school; the 1,000 plants could not be proved by plants cultivated elsewhere. Had the entire document been admitted, it would have been obvious that Exhibits 27 and 38 did not relate to the Chico grow at all – a conclusion the district judge spontaneously voiced while comparing the government exhibits with the complete Silicon Valley proposal at the safety valve hearing.

At trial, however, the district court had refused to admit Trial Exhibit A because it mentioned the state medical marijuana law. Defense counsel stated he believed the entire document was turned over by the government in discovery, and offered to retrieve it from his office. The prosecutor convinced him otherwise, adamantly insisting that the two government exhibits were stand-alone documents, and that when they were turned over in discovery they were surrounded by other documents.[15] This misrepresentation convinced defense counsel that he was wrong about the document being among the discovery materials, and he did not look for it.

The Ninth Circuit's Amended Memorandum affirmed the district court's refusal to admit Exhibit A

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[15] Although the prosecutor's misrepresentation was technically true, the entire Silicon Valley proposal was also turned over in discovery, separated only by 100 pages from Exhibit 27 and 25 pages from Exhibit 38.

under Rule 106, stating: "[t]his was not erroneous, given Epis's trial counsel's abandonment of the position that the proposal was turned over during discovery." 2009 U.S. App. LEXIS 17833 at * 4 n. 1. App. 5. That is not a legitimate reason for exclusion. The document does not have to be turned over in discovery in order to be admissible under Rule 106. If the court meant that, because trial counsel abandoned the position and thereby failed to obtain and introduce the complete document, that is not a sufficient reason either. Rule 106 states "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of *any other part*" of that document. (Emphasis added.) It does not have to be the complete document, since the only purpose of its admission is to prove that the fragment was taken out of context by the opponent.

Furthermore, trial counsel's abandonment of his position that the document was turned over in discovery was induced by the prosecutor's false suggestions which convinced defense counsel that the entire Silicon Valley proposal was *not* turned over in discovery. As this Court stated in *Banks v. Dretke*, 540 U.S. 668, 693 (2004), when the prosecutor makes a representation that is false, "defense counsel cannot be faulted for relying on that representation." Defense counsel should be free to assume that "prosecutors would not stoop to improper litigation conduct

to advance prospects for gaining a conviction." *Id.* at 694.

CONCLUSION

WHEREFORE, for the foregoing reasons, certiorari should be granted.

Dated: December 9, 2009

Respectfully submitted,

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRYAN JAMES EPIS, Defendant-Appellant

Nos. 02-10523 and 07-10462

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

2009 U.S. App. LEXIS 17833

March 23 2009, Submitted,**
San Francisco, California

August 11, 2009, Filed

COUNSEL: For UNITED STATES OF AMERICA (02-10523), Plaintiff-Appellee: Samuel Wong, Assistant U.S. Attorney, USSAC – OFFICE OF THE U.S. ATTORNEY, Sacramento, CA.

For BRYAN JAMES EPIS (02-10523), Defendant-Appellant: Brenda Grantland, Esquire, Attorney, Mill Valley, CA.

For UNITED STATES OF AMERICA (07-10462), Plaintiff-Appellee: Samuel Wong, Assistant U.S. Attorney, USSAC – OFFICE OF THE U.S. ATTORNEY, Sacramento, CA.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

For BRYAN JAMES EPIS (07-10462), Defendant-Appellant: Brenda Grantland, Esquire, Attorney, Mill Valley, CA.

JUDGES: Before: HAWKINS, RAWLINSON and BYBEE, Circuit Judges. Rawlinson, Circuit Judge, concurring.

OPINION

AMENDED MEMORANDUM*

Before: HAWKINS, RAWLINSON and BYBEE, Circuit Judges.

Bryan Epis ("Epis") was convicted under the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 841(a)(1), 846, 860(a), for conspiracy to manufacture 1,000 marijuana plants within 1,000 feet of a school and for manufacture of 100 marijuana plants within 1,000 feet of a school. He appeals his conviction on several grounds, claiming improper retroactive application to his case of Supreme Court rulings, prosecutorial misconduct during his trial, an erroneous denial of judgment for acquittal, improper cross-examination regarding a prior marijuana cultivation arrest, and a claimed deficiency in the conspiracy count of the indictment allowing the jury to reach a non-unanimous verdict. He also appeals his 120-month mandatory minimum sentence, which

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36.3.

he argues resulted from the district court's improper denial of safety-valve relief from the mandatory minimum sentence requirements of 21 U.S.C. § 841(a)(1) and § 860.

Epis's convictions do not impose upon him an ex post facto punishment. Epis claims he believed that federal law prohibiting marijuana cultivation would not override state law permitting it because of limitations on the federal government's powers under the Commerce Clause. However, the plain language of the CSA provides Epis with "fair notice" that his conduct violated federal law, *see United States v. Batchelder,* 442 U.S. 114, 123, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979), and his conviction did not rely on a judicial construction of the CSA that was "unexpected and indefensible by reference to the law which had been expressed" at the time of the conduct. *Bouie v. City of Columbia,* 378 U.S. 347, 354, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964) (internal quotation marks omitted). As even the ballot argument in favor of California's medical marijuana initiative clearly acknowledged, "a state initiative cannot overrule [federal] laws." This is particularly obvious in the case of a marijuana growing operation of this scope, which could have affected interstate commerce.

Relying on *United States v. Aguilar,* 883 F.2d 662, 692-93 (9th Cir. 1989), Epis also argues that he thought he would be entitled to a medical "necessity" defense even though the text of the CSA clearly prohibits the manufacture of marijuana and contains no exception for medical necessity. At the time Epis

manufactured marijuana, no federal court had recognized a medical necessity defense in a marijuana manufacturing case and there was no firm basis to expect that they would. Although the Ninth Circuit later recognized a medical necessity defense in *United States v. Oakland Cannabis Buyers' Cooperative* ("*OCBC*"), 190 F.3d 1109, 1114 (9th Cir. 1999), Epis could not have relied on that ruling *at the time* he violated the CSA because his illegal activities preceded that decision. There is also reason to doubt that the medical necessity defense would even apply to growing operations that, like Epis's, extended beyond the growers' personal use, but we need not even decide that question because the Supreme Court has overruled *OCBC*. *United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001). The introduction and subsequent elimination of a new defense after an individual has violated the law does not render the CSA an ex post facto law or implicate due process concerns.

Epis has not introduced adequate evidence to support his contention that the prosecutor solicited or knowingly allowed to go uncorrected any false testimony. *See United States v. Bagley,* 473 U.S. 667, 680 n.8, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (citing *Napue v. Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). Epis claims the prosecutor allowed two federal agents to testify falsely that Exhibit 27, a spreadsheet found in Epis's home, related to the growing operation that took place

there, rather than to a separate proposal relating to Epis's quickly abandoned plan to grow or distribute marijuana in Silicon Valley.[1] Epis testified at trial that Exhibit 27 merely consisted of some thoughts he had on reducing the average price of marijuana, but now contends that, after he testified, he remembered the spreadsheet related to a proposal for the Silicon Valley Cannabis Club, which he had drafted and then abandoned.[2]

The two federal agents testified that they believed Exhibit 27 pertained to Epis's existing operation because it was found at the location of Epis's marijuana operation and its initial dates and capacity projections corresponded, at least approximately, with the capacity of Epis's operation at the time the law enforcement shut it down. Although they admitted that Epis's projections were "optimistic" and that the plan might have eventually entailed an expansion beyond Epis's home, the agents continued to believe that Exhibit 27 pertained to Epis's existing operation

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[1] The spreadsheet contained columns with dates spanning a nine-month period and data associated with each date. The data included marijuana club membership numbers (increasing from 20 to 100,000) and exponentially increasing quantities of marijuana along with corresponding net profit amounts, which equaled $1.8 million per week by the end of the nine-month span.

[2] Epis challenges the district court's decision to exclude the Silicon Valley proposal under Federal Rule of Evidence 403, rather than admitting it under the rule of completion. This was not erroneous, given Epis's trial counsel's abandonment of the position that the proposal was turned over during discovery.

even after hearing both of Epis's alternative explanations of the document. The prosecutor did not commit misconduct by soliciting this reasonable opinion testimony.

Epis also challenges the agents' testimony relating to a reinforced door, which they suggested was consistent with an intent to continue the operation for a long duration. Epis chose to testify in his own defense and therefore could have offered his own explanation -- that the door was installed as part of a previous marijuana growing operation – for the jury to consider, but he chose not to do so.[3]

Epis also claims prosecutorial misconduct because the government destroyed evidence while his case was still being appealed. Absent bad faith or exculpatory value to the accused, however, the destruction of evidence is not a due process violation. *California v. Trombetta,* 467 U.S. 479, 488-489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *Arizona v. Youngblood,* 488 U.S. 51, 55-59, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). In this case, Epis had access to all of the evidence during the trial and never asserted a claim that it had been tampered with at that time. The evidence was only mishandled or destroyed after trial, by government employees laboring under the

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[3] After the district court decided to allow the government to cross-examine Epis for impeachment purposes in relation to the prior growing operation, any reason Epis may have had to avoid proffering his own explanation of the door lost its force.

misapprehension that Epis's appeals had concluded and that his conviction was final. Although the destruction of evidence could be a significant issue if Epis were entitled to a new trial on other grounds, the district court did not err by conforming its proceedings to the narrow scope of our remand.

The district court also did not err by denying Epis a judgment of acquittal. The government had introduced sufficient evidence for the jury to find that there was a conspiracy and it was intended to continue long enough for 1,000 plants to be grown within 1,000 feet of a school. This evidence included extra equipment and materials related to marijuana manufacturing in Epis's home, additional space in his basement and other areas of his house in which to expand, notes that reflected weekly harvests of 18 plants, and a spreadsheet projecting exponential growth. This evidence, although circumstantial, is sufficient to support the inference that Epis planned to continue the operation long enough that a total of 1,000 plants would be grown in his home. *See United States v. Lennick,* 18 F.3d 814, 820 (9th Cir. 1994) ("Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction."). Viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the prosecution, the district court correctly found the evidence sufficient to sustain Epis's convictions on both counts. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560

(1979); *United States v. Lucas,* 963 F.2d 243, 247 (9th Cir. 1992).

The district court did not abuse its discretion by allowing the prosecution to question Epis about prior criminal activity in order to impeach his credibility. Federal Rule of Evidence 608(b) permits specific instances of prior criminal activity to be subject to cross-examination if probative of the witness's character for truthfulness. Epis placed his credibility at issue when he testified on direct examination that he was motivated to engage in multiple conspiracies to grow marijuana for humanitarian reasons, rather than by his desire for profit. A defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination *are* subject to proper impeachment by the government even by evidence that would otherwise be inadmissible on the government's direct case. *United States v. Havens,* 446 U.S. 620, 627-28, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980); *see also United States v. Palmer,* 691 F.2d 921, 922 (9th Cir. 1982). Given Epis's testimony on direct, his prior arrest for cultivation of marijuana for sale was relevant and probative of Epis's credibility.

Epis failed to object to the indictment or to the jury instructions and has therefore waived his right to raise the potential duplicity of the indictment on appeal, but still has the right to a unanimous jury verdict pursuant to the Sixth Amendment. *See United States v. Savage,* 67 F.3d 1435, 1439 (9th Cir. 1995). Epis argues that the language of Count One of the

indictment, which charged that he conspired to grow 1,000 plants of marijuana within 1,000 feet of a school,[4] was ambiguous because the jury could have inferred that the phrase "within 1,000 feet of a school" applied to the location of the conspiracy, rather than the location where at least 1,000 marijuana plants were grown (or would have been grown if the conspiracy had been allowed to continue). Epis argues that to prevent a non-unanimous verdict, the jury should have been instructed that they would have to find *both* that there was a conspiracy to grow 1,000 plants, *and* that the 1,000 plants would have be grown within 1,000 feet of a school.

Because Epis did not object to the indictment or special verdict form at trial, however, we need only determine whether any ambiguity was plain error that "prejudiced the defendant's substantial rights so as to affect seriously the fairness or integrity of the proceedings." *Id.* at 1439. The ambiguity did not compromise the fairness or integrity of the proceedings, however, because Epis never testified

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[4] This conspiracy charge was based on three statutory sections. Section 841(a)(1) renders it illegal for a person "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." 21 U.S.C. at § 841(a)(1). Section 860 specifies that any person who violates § 841(a)(1) within 1,000 feet of a school is subject to stricter penalties. 21 U.S.C. § 860. Finally, an attempt or conspiracy to violate § 860 is "subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

and his counsel never argued that Epis might have discontinued growing marijuana in his house while continuing to grow it elsewhere. Therefore, even if the jurors believed that complete fulfillment of Epis's "marketing plan" ultimately might require the operation to expand beyond its current location, their verdict shows that they believed the operation would continue for a significant period of time, at least long enough for a few hundred more plants to be grown solely in Epis's home.

Finally, the district court did not err in denying Epis safety-valve relief from the mandatory minimum sentence required under 21 U.S.C. § 860(a). Epis concedes that under *United States v. Kakatin,* 214 F.3d 1049 (9th Cir. 2000), he is not eligible for safety-valve relief from § 860's one-year mandatory minimum. *See id.* at 1051-52 (the "safety-valve" exception under 18 U.S.C. § 3553(f) applies to § 841, but not § 860). Epis argues that he *is* eligible for relief from the higher 120-month mandatory minimum set out in § 841(b), and incorporated by reference in § 860, because the safety-valve provisions of § 3553(f) do apply to sentences calculated for offenses under § 841.

Other circuits have rejected this argument. *United States v. Phillips,* 382 F.3d 489, 499 (5th Cir. 2004); *United States v. Anderson,* 200 F.3d 1344, 1348 (11th Cir. 2000), *United States v. McQuilkin,* 78 F.3d 105, 108-09 (3d Cir. 1996). Although this circuit has considered a somewhat similar issue pertaining to a different statutory provision, *see United States v.*

Gamboa-Cardenas, 508 F.3d 491, 498-501 (9th Cir. 2007), we have not addressed this question directly.[5]

We decline to do so in this case, however, because the district court found that Epis has not fulfilled two of the five criteria required under § 3553(f) and therefore would not be eligible for a sentence below the mandatory minimum even if Epis's view of the relationship between § 841 and § 860 is correct. The district court found both that Epis was a "manager" in the conspiracy and that he did not meet his burden of "truthfully provid[ing] to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." 18 U.S.C. § 3553(f)(4) & (5).

A district court's finding that a defendant has failed to prove by a preponderance of the evidence that he qualifies for the safety-valve provision should be affirmed unless a review of the record leaves us with "a definite and firm conviction that a mistake has been made." *United States v. Palafox-Mazon*, 198

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[5] The statutory analysis in *Gamboa-Cardenas* focused on the "in accordance with the penalties set forth" language in 46 U.S.C. § 1903. *Gamboa-Cardenas*, 508 F.3d at 499. Whether the same analysis applies to § 860, which employs the phrase "offenses under," depends on whether Congress's use of different language in § 860 demonstrates a different intent and would consequently preserve safety-valve eligibility in relation to the mandatory minimums established by other statutory sections, which are often much higher than the mandatory minimums established in § 860 itself.

F. 3d 1182, 1186 (9th Cir. 2000). In this case, there is evidence that Epis had the power to terminate the marijuana operation, paid at least one other member of the conspiracy, recruited at least one other member, received reports of hourly work from a third, and supplied the location, the electricity, and all of the equipment (as well as some of the marijuana plants) for the operation. Given this evidence, the district court did not clearly err by finding Epis had "exercise[d] authority" over at least one of the other participants. *United States v. Maldonado,* 215 F.3d 1046, 1050 (9th Cir. 2000). The district court's finding that Epis did not demonstrate by a preponderance of the evidence that he spoke truthfully during his debriefing regarding the involvement of another member of the conspiracy in Epis's previous marijuana growing operation was also not clearly erroneous.

For the forgoing reasons, Epis's convictions and sentences are **AFFIRMED.**

ORDER

Before: HAWKINS, RAWLINSON and BYBEE, Circuit Judges.

The Memorandum disposition filed on April 8, 2009, is amended per the Amended Memorandum filed concurrently with this Order.

The panel has voted to deny Appellant's Petition for Rehearing and/or Rehearing En Banc.

The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

No further petitions for rehearing or rehearing en banc will be accepted.

CONCUR BY: Rawlinson

CONCUR

Rawlinson, Circuit Judge, concurring:

I concur in the result.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRYAN JAMES EPIS, Defendant-Appellant

Nos. 07-10462

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

324 Fed. Appx. 560; 2009 U.S. App. LEXIS 7823

March 23 2009, Submitted,**
San Francisco, California

April 8, 2009, Filed

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff-Appellee: Samuel Wong, Assistant U.S. Attorney, USSAC-OFFICE OF THE U.S. ATTORNEY, Sacramento, CA.

For BRYAN JAMES EPIS, Defendant-Appellant: Brenda Grantland, Esquire, Attorney, Mill Valley, CA.

JUDGES: Before: HAWKINS, RAWLINSON and BYBEE, Circuit Judges. Rawlinson, Circuit Judge, concurring.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

OPINION

MEMORANDUM*

Before: HAWKINS, RAWLINSON and BYBEE, Circuit Judges.

Bryan Epis ("Epis") was convicted under the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 841(a)(1), 846, 860(a), for conspiracy to manufacture 1,000 marijuana plants within 1,000 feet of a school and for manufacture of 100 marijuana plants within 1,000 feet of a school. He appeals his conviction on several grounds, claiming improper retroactive application to his case of Supreme Court rulings, prosecutorial misconduct during his trial, an erroneous denial of judgment for acquittal, improper cross-examination regarding a prior marijuana cultivation arrest, and a claimed deficiency in the conspiracy count of the indictment allowing the jury to reach a non-unanimous verdict. He also appeals his 120-month mandatory minimum sentence, which he argues resulted from the district court's improper denial of safety-valve relief from the mandatory minimum sentence requirements of 21 U.S.C. § 841(a)(1) and § 860.

Epis's convictions do not impose upon him an ex post facto punishment. Epis claims he believed that federal law prohibiting marijuana cultivation would

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

not override state law permitting it because of limitations on the federal government's powers under the Commerce Clause. The Constitution's Ex Post Facto Clause is implicated where a "judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed" at the time of the conduct. *Bouie v. City of Columbia,* 378 U.S. 347, 354, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964) (internal quotation marks omitted). Prosecuting Epis under the CSA does not require such an "unexpected" or "indefensible" judicial construction of the statute: As even the ballot argument in favor of California's medical marijuana initiative clearly acknowledged, "a state initiative cannot overrule [federal] laws." This is particularly obvious in the case of a large-scale marijuana growing operation, which can have an impact on interstate commerce.

Relying on *United States v. Aguilar,* 883 F.2d 662, 692-93 (9th Cir. 1989), Epis also argues that he thought he would be entitled to a medical "necessity" defense even though the text of the CSA clearly prohibits the manufacture of marijuana and contains no exception for medical necessity. At the time Epis manufactured marijuana, no federal court had recognized a medical necessity defense in a marijuana manufacturing case and there was no firm basis to expect that they would. Although the Ninth Circuit later recognized a medical necessity defense in *United States v. Oakland Cannabis Buyers' Cooperative ("OCBC"),* 190 F.3d 1109, 1114 (9th Cir. 1999), Epis

could not have relied on that ruling *at the time* he violated the CSA because his illegal activities preceded that decision. There is also reason to doubt that the medical necessity defense would even apply to growing operations that, like Epis's, were large-scale and extended beyond the growers' personal use, but we need not even decide that question because the Supreme Court has overruled *OCBC*. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001). The introduction and subsequent elimination of a new defense after an individual has violated the law does not render the CSA an ex post facto law or implicate due process concerns.

Epis claims two federal agents committed perjury when they testified at an evidentiary hearing that a spreadsheet found in Epis's home related to the growing operation that took place there, rather than to a separate proposal relating to his quickly abandoned plan to grow or distribute marijuana in Silicon Valley. The spreadsheet contained columns with dates spanning a nine-month period and data associated with each date. The data included marijuana club membership numbers (increasing from 20 to 100,000) and exponentially increasing quantities of marijuana along with corresponding net profit amounts, which equaled $1.8 million per week by the end of the nine-month span. Epis testified at trial that the spreadsheet merely consisted of some thoughts he had on reducing the average price of marijuana, but now contends that, after he testified, he remembered the

spreadsheet related to a proposal for the Silicon Valley Cannabis Club, which he had drafted and then abandoned.

The federal agents may have reasonably rejected Epis's explanation and instead believed that it pertained to the existing operation, and to a plan to expand that operation, because the printed spreadsheet was found at the same location as Epis's marijuana operation and the first date listed and initial membership numbers corresponded with that operation. It was not an abuse of discretion for the district court to find that the prosecutor did not solicit or allow to go uncorrected any false testimony related to the spreadsheet. *See United States v. Bagley,* 473 U.S. 667, 680 n.8, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (citing *Napue v. Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). Similarly, the agents' testimony relating to a reinforced door as evidence of an intent to continue the operation for a long duration may have been somewhat misleading, but was technically accurate. Epis chose to testify in his own defense and therefore could have offered his own explanation – that the door was installed as part of a previous marijuana growing operation – for the jury to consider. After the district court decided to allow the government to cross-examine Epis for impeachment purposes in relation to the prior growing operation, any reason Epis may have had to avoid proffering his own explanation of the door lost its force.

Epis also claims prosecutorial misconduct because the government destroyed evidence while his case was still being appealed. Absent bad faith or exculpatory value to the accused, however, the destruction of evidence is not a due process violation. *California v. Trombetta,* 467 U.S. 479, 488-489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *Arizona v. Youngblood,* 488 U.S. 51, 55-59, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). In this case, Epis had access to all of the evidence during the trial and the evidence was only mishandled or destroyed after trial by government employees laboring under the misapprehension that Epis's appeals had concluded and that his conviction was final. Although the destruction of evidence would be a significant issue if Epis were entitled to a new trial on other grounds, the district court did not err in holding that Epis had not met his burden of showing that any of the destroyed evidence would have been exculpatory or that the government destroyed the evidence in bad faith.

The district court also did not err by denying Epis a judgment of acquittal. The government had introduced sufficient evidence for the jury to find that there was a conspiracy and it was intended to continue long enough for 1,000 plants to be grown within 1,000 feet of a school. This evidence included extra equipment and materials related to marijuana manufacturing in Epis's home, additional space in his basement and other areas of his house in which to expand, notes that reflected weekly harvests of 18 plants, and a spreadsheet projecting exponential

growth. This evidence, although circumstantial, is sufficient to support the inference that Epis planned to continue the operation long enough that a total of 1,000 plants would be grown in his home. *See United States v. Lennick,* 18 F.3d 814, 820 (9th Cir. 1994) ("Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction."). Viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the prosecution, the district court correctly found the evidence sufficient to sustain Epis's convictions on both counts. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Lucas,* 963 F.2d 243, 247 (9th Cir. 1992).

The district court did not abuse its discretion by allowing the prosecution to question Epis about prior criminal activity in order to impeach his credibility. Federal Rule of Evidence 608(b) permits specific instances of prior criminal activity to be subject to cross-examination if probative of the witness's character for truthfulness. Epis placed his credibility at issue when he testified on direct examination that he was motivated to engage in multiple conspiracies to grow marijuana for humanitarian reasons, rather than by his desire for profit. A defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination *are* subject to proper impeachment by the government even by evidence that would otherwise be inadmissible on the government's direct case. *United States v.*

Havens, 446 U.S. 620, 627-28, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980); *see also United States v. Palmer,* 691 F.2d 921, 922 (9th Cir. 1982). Given Epis's testimony on direct, his prior arrest for cultivation of marijuana for sale was relevant and probative of Epis's credibility.

Epis failed to object to the indictment or to the jury instructions and has therefore waived his right to raise the potential duplicity of the indictment on appeal, but still has the right to a unanimous jury verdict pursuant to the Sixth Amendment. *See United States v. Savage,* 67 F.3d 1435, 1439 (9th Cir. 1995). Epis argues that the language of Count One of the indictment, which charged that he conspired to grow 1,000 plants of marijuana within 1,000 feet of a school,[1] was ambiguous because the jury could have inferred that the phrase "within 1,000 feet of a school" applied to the location of the conspiracy, rather than the location where at least 1,000 marijuana plants were grown (or would have been grown if the conspiracy had been allowed to continue). Epis argues that to prevent

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[1] This conspiracy charge was based on three statutory sections. Section 841(a)(1) renders it illegal for a person "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." 21 U.S.C. at § 841(a)(1). Section 860 specifies that any person who violates § 841(a)(1) within 1,000 feet of a school is subject to stricter penalties. 21 U.S.C. § 860. Finally, an attempt or conspiracy to violate § 860 is "subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

a non-unanimous verdict, the jury should have been instructed that they would have to find *both* that there was a conspiracy to grow 1,000 plants, *and* that the 1,000 plants would have be grown within 1,000 feet of a school.

Because Epis did not object to the indictment or special verdict form at trial, however, we need only determine whether any ambiguity was plain error that "prejudiced the defendant's substantial rights so as to affect seriously the fairness or integrity of the proceedings." *Id.* at 1439. The ambiguity did not compromise the fairness or integrity of the proceedings, however, because Epis never testified and his counsel never argued that Epis might have discontinued growing marijuana in his house while continuing to grow it elsewhere. Therefore, even if the jurors believed that complete fulfillment of Epis's "marketing plan" ultimately might require the operation to expand beyond its current location, their verdict shows that they believed the operation would continue for a significant period of time, at least long enough for a few hundred more plants to be grown solely in Epis's home.

Finally, the district court did not err in denying Epis safety-valve relief from the mandatory minimum sentence required under 21 U.S.C. § 860(a). Epis concedes that under *United States v. Kakatin,* 214 F.3d 1049 (9th Cir. 2000), he is not eligible for safety-valve relief from § 860's one-year mandatory minimum. *See id.* at 1051-52 (the "safety-valve" exception under 18 U.S.C. § 3553(f) applies to § 841,

but not § 860). Epis argues that he *is* eligible for relief from the higher 120-month mandatory minimum set out in § 841(b), and incorporated by reference in § 860, because the safety-valve provisions of § 3553(f) do apply to sentences calculated for offenses under § 841.

Other circuits have rejected this argument. *United States v. Phillips,* 382 F.3d 489, 499 (5th Cir. 2004); *United States v. Anderson,* 200 F.3d 1344, 1348 (11th Cir. 2000), *United States v. McQuilkin,* 78 F.3d 105, 108-09 (3d Cir. 1996). Although this circuit has considered a somewhat similar issue pertaining to a different statutory provision, *see United States v. Gamboa-Cardenas,* 508 F.3d 491, 498-501 (9th Cir. 2007), we have not addressed this question directly.[2]

We decline to do so in this case, however, because the district court found that Epis has not fulfilled two of the five criteria required under § 3553(f) and therefore would not be eligible for a sentence below the mandatory minimum even if Epis's view of the relationship between § 841 and § 860 is correct. The

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[2] The statutory analysis in *Gamboa-Cardenas* focused on the "in accordance with the penalties set forth" language in 46 U.S.C. § 1903. *Gamboa-Cardenas,* 508 F.3d at 499. Whether the same analysis applies to § 860, which employs the phrase "offenses under," depends on whether Congress's use of different language in § 860 demonstrates a different intent and would consequently preserve safety-valve eligibility in relation to the mandatory minimums established by other statutory sections, which are often much higher than the mandatory minimums established in § 860 itself.

district court found both that Epis was a "manager" in the conspiracy and that he did not meet his burden of "truthfully provid[ing] to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." 18 U.S.C. § 3553(f)(4) & (5).

A district court's finding that a defendant has failed to prove by a preponderance of the evidence that he qualifies for the safety-valve provision should be affirmed unless a review of the record leaves us with "a definite and firm conviction that a mistake has been made." *United States v. Palafox-Mazon,* 198 F.3d 1182, 1186 (9th Cir. 2000). In this case, there is evidence that Epis had the power to terminate the marijuana operation, paid at least one other member of the conspiracy, recruited at least one other member, received reports of hourly work from a third, and supplied the location, the electricity, and all of the equipment (as well as some of the marijuana plants) for the operation. Given this evidence, the district court did not clearly err by finding Epis had "exercise[d] authority" over at least one of the other participants. *United States v. Maldonado,* 215 F.3d 1046, 1050 (9th Cir. 2000). The district court's finding that Epis did not demonstrate by a preponderance of the evidence that he spoke truthfully during his debriefing regarding the involvement of another member of the conspiracy in Epis's previous marijuana growing operation was also not clearly erroneous.

For the forgoing reasons, Epis's conviction and sentence are **AFFIRMED**.

CONCUR BY: Rawlinson

CONCUR

Rawlinson, Circuit Judge, concurring:

I concur in the result.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRYAN JAMES EPIS, Defendant-Appellant.	No. 02-10523 D.C. No. CR-97-00381-FCD ORDER (Filed Aug. 10, 2004)

Before: LAY,* HAWKINS, and BYBEE, Circuit Judges.

Sua sponte, we clarify our amended Order of August 9, 2004:

(1) Epis has been granted bail by this court; (2) he is to be admitted to bail promptly upon and pursuant to conditions established by the district court; and (3) bail shall remain in effect until final resolution of the issues identified in our Amended Order of Remand.

The mandate shall issue forthwith.

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BRYAN JAMES EPIS, *Defendant-Appellant.*	No. 02-10523 D.C. No. CR-97-00381-FCD ORDER AND AMENDED ORDER OF REMAND

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, Jr., District Judge, Presiding

Argued and Submitted
June 16, 2004 – San Francisco, California

Filed July 12, 2004
Amended July 22, 2004

Before: Donald P. Lay,* Michael Daly
Hawkins, and Jay S. Bybee, Circuit Judges.

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

COUNSEL

Brenda Grantland, Mill Valley, California, for the defendant-appellant.

Samuel Wong, Assistant United States Attorney, Sacramento, California, for the plaintiff-appellee.

ORDER

The Order of Remand filed on July 12, 2004, is amended as follows: on page 9062, line 13, substitute "with the extant law applicable to sentencing" for "with the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. ___ (2004) 2004 WL 1402697 (June 24, 2004)."

ORDER

This cause came on for hearing before the court on June 16, 2004. The Supreme Court of the United States has now granted certiorari in *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted* (U.S. June 28, 2004) (No. 03-1454), which is a related case dealing with the growing and use of marijuana for medicinal purposes.

This court now remands this case to the district court for reconsideration of the judgment following the decision by the Supreme Court in *Raich*. If, after considering any application of *Raich* to this case, the district court determines that Epis's conviction should remain intact, the district court should then proceed to re-sentence Epis in a manner consistent with the

extant law applicable to sentencing. The panel of this court retains jurisdiction pending reconsideration by the district court.

IT IS SO ORDERED.

United States District Court
Eastern District of California
Sacramento Division

CR S-97-0381 FCD

SACRAMENTO, CALIFORNIA
FRIDAY, SEPTEMBER 14, 2007;
MORNING SESSION

Before the Honorable Frank C. Damrell, Jr., Judge.

THE CLERK: Calling number ten, criminal case 97-0381, United States versus Bryan Epis.

* * *

[33] Finally, with respect to departure based on prosecutorial misconduct, the hearing on May 22, 2006, I ruled that the issue of prosecutorial misconduct either relating to the introduction of certain evidence at trial or due to the government's destruction of evidence was irrelevant to sentencing.

I'm dealing with a sentencing issue as opposed to an appellate issue, which the Ninth circuit may well consider. The court found and I found in that case that the jury reached a verdict finding the defendant guilty of conspiracy to manufacture at least 1,000 plants within 1,000 feet of a [34] school.

I have to apply the jury's finding in this case. I can't go around behind the jury's finding and overturn it.

Rule 33(b)(1), new trial motion time, has long expired and there was never a motion before me on

that issue regarding a new trial; moreover, pursuant to the remand order, the Ninth Circuit made it clear I can't entertain any de facto motion to overturn the jury's verdict.

I tried to make that clear at the outset. That's not my role at this juncture. I'm here to sentence the defendant.

* * *

[45] MR. WONG: The other finding I would ask the Court to make is that Epis did not tell the truth when he said that the marijuana stayed in Chico.

THE COURT: Why is that a necessary finding?

MR. WONG: It's a finding –

THE COURT: The jury found him guilty. I'm making findings on the sentencing factors. Why do I have to comment on his testimony?

MR. WONG: It impacts on whether Exhibit 27 was misused by the prosecution.

THE COURT: Let the Ninth Circuit sort that out. I'll not make that finding. We'll get to that on the bail review issue.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

– – – oOo – – –

BEFORE THE HONORABLE
FRANK C. DAMRELL, JR., JUDGE

– – – oOo – – –

UNITED STATES OF AMERICA, Plaintiff, vs. BRYAN JAMES EPIS, Defendant.	Case No. CR. S-97-0381 FCD

REPORTER'S TRANSCRIPT

OF PROCEEDINGS HELD ON

MONDAY, MAY 22, 2006

1:30 P.M.

– – – oOo – – –

* * *

SACRAMENTO, CALIFORNIA

MONDAY, MAY 22, 2006, 1:30 P.M.

– – – oOo – – –

[3] THE CLERK: Calling criminal case 97-381, United States versus Bryan Epis.

It's on for a Government motion to reconsider and a status regarding an evidentiary hearing, your Honor.

MR. WONG: Good afternoon, your Honor. Samuel Wong, Assistant United States Attorney, appearing on behalf of the United States.

MS. GRANTLAND: Good afternoon, your Honor.

Brenda Grantland on behalf of Bryan Epis.

THE COURT: Good afternoon, counsel.

This matter is on for hearing of Government's motion for reconsideration and further matters related to discovery, which, in turn, relates to the disclosure by the Government of destruction of certain evidence after the conviction of the defendant.

Counsel, I have given thought to the Court's order on December 5 in which I indicated that I thought that the defendant was entitled to discovery. And I went back and I re-read the remand of the Ninth Circuit in this case. And I'm going to grant the motion for reconsideration, because I think the remand is controlling.

The Ninth Circuit ordered this Court as follows: "The [4] Supreme Court of the United States has now granted cert in *Raich versus Ashcroft*," which is a related case dealing with – we have a *Raich* issue, as the parties are well aware – which first dealt with the issue of medicinal use of marijuana. And the Court

said – now this is the Court's order: "The Court now remands this case to the district court for reconsideration of the judgment following the decision of the Supreme Court in *Raich*," which, as you recall, came about a year after the remand. That was in June of last year, 2005, that the *Raich* case came down.

"If, after considering the pending application of *Raich* to this case, the district court determines that Epis's conviction should remain intact" – which I would do, if I haven't already done. That's hardly surprising. It would not be *Raich* – "the district court should then proceed to resentence Epis in a manner consistent with the extant law applicable to sentencing.

"The panel of this court retains jurisdiction pending reconsideration by the district court" – reconsideration of the sentence based upon *Raich*.

Now, if the Court reconsiders the sentencing based upon *Raich*, then I will – I can discuss that at greater length and will do so, then I'm – seems to me the Court then is left with resentencing the defendant.

And the problem I have with the destruction of evidence [5] issue is that if, in fact, there has been evidence of bad faith in the destruction of evidence that has tainted the jury's verdict, Ms. Grantland, you're not asking for a reduction of sentence, you're looking for a sentence overturn effort. This is a Ninth

Circuit matter. You're seeking reversal of this judgment, which has nothing to do with resentencing.

I understand why – let me make it clear. I was upset when I found out about the destruction of evidence, but that issue really goes to overturning the verdict, not to lowering the sentence of your client.

MS. GRANTLAND: Your Honor –

THE COURT: That is so obvious, and there's case law that supports that in terms of this finding of misconduct, there's nothing germane to resentencing.

MS. GRANTLAND: Your Honor, if that were the only thing that this goes to, then that would be a different matter, because it would probably be beyond the scope of the remand.

But in its sentencing memorandum, the Government is continuing to rely on the falsified evidence and including some falsified evidence that – falsified testimony that we have not yet put the – put on before the Court.

The destroyed evidence that we were trying to get access to was the – back last summer, goes to some of the sentencing issues, including – I might as well reveal it [6] now – the agents exaggerated the amount of Growdan cubes and supplies and equipment in order to justify this larger verdict. They're continuing to rely on this.

THE COURT: But this is – I want to understand what you are saying here. You want the Court to overturn the jury's verdict. That's the problem. That is a Ninth Circuit issue. You're talking about falsified evidence that tainted the verdict. You're talking about destruction of evidence that tainted the verdict. I have a jury that rendered a verdict in this case. I have no power to turn around now, some years later, and certainly I'm not given that authority by the Ninth Circuit. That goes without saying. I'm only here to resentence.

It may seem like an artificial distinction, but it's a crucial distinction, because you're not seeking a lower sentence here –

MS. GRANTLAND: Your Honor –

THE COURT: – or departure. You may like to see that too.

MS. GRANTLAND: Yes, your Honor. We are seeking –

THE COURT: You're looking to overturn this verdict. That's your case.

MS. GRANTLAND: Number one, we're seeking the safety valve.

THE COURT: Well, I understand. The safety valve is a [7] different issue.

MS. GRANTLAND: The Government is continuing to say that the Government exhibits that we have on appeal right now as the basis of our

prosecutorial misconduct claim are valid and the Court should rely on them at sentencing. And we are saying the Court should not rely on that at sentencing.

Part of our proof for some of these misconduct claims we are trying to stop the Court from relying on at the resentencing, the corroborating evidence was destroyed by the Government.

So, even though that would be a side effect, first of all, we are not asking you to overturn the sentence. We have already asked the Court of Appeals to. They may have to tell us, okay, we're going to remand yet again for you to have this hearing on the destruction of the evidence, but to the extent the Government intends to rely on this evidence in resentencing, we are entitled to fight that.

THE COURT: Well, if you're talking about an evidentiary hearing on the safety valve, we can reach that. That's another discussion, and I intend to talk about that this afternoon. But that's a different – that's a sentencing issue. We can address that.

But I'm talking now about the issue related to the discovery process which I think goes way beyond the remand, and if, as you say, the Ninth Circuit may decide that they [8] want to re-remand this to me to conduct such a hearing and make findings on the determination of whether or not the jury's verdict may have been tainted, I don't know. That's not before me.

And the question of the safety valve is before me on resentencing, and you may or may not be entitled to an evidentiary hearing on that issue. One of the problems you have on that issue, now that you've brought it up, is that we have the 860 issue that I'm not going to get around. The 860 is expressly concluded from my – from the safety valve consideration. That requires –

MS. GRANTLAND: But I argue that, your Honor –

THE COURT: Pardon me?

MS. GRANTLAND: – the safety valve –

THE COURT: Go ahead.

MS. GRANTLAND: The 860 safety valve has – 860 has a one year mandatory minimum specifically in its provisions. It does not have any others. The mandatory minimum that got Bryan the ten years did not come from 860. It came from 841, which has a safety valve on it. That's one of – we've argued that before your Honor.

THE COURT: But the point is that's a safety valve issue. The legal issue of the applications of 860 and with respect to whether or not your client is an organizer and leader, those are the primary issues, as I understand it, [9] that you're relying upon in the safety valve argument.

Is that correct?

MS. GRANTLAND: It's been so long since I've looked at that memorandum, I can't remember.

THE COURT: I think it's in there.

Mr. Wong?

MR. WONG: There was one additional issue, your Honor. The Government maintains that Mr. Epis was not truthful and complete in his safety valve debriefing, so that is another reason to disqualify him from the safety valve.

MS. GRANTLAND: Your Honor, and part of their argument about this truthfulness goes right back to this very same tainted evidence. And the only way that I can see, especially given the fact that falsified evidence violates due process, for the Government to rely on falsified evidence, the only way for the Court to resentence Bryan Epis is to disregard this evidence that the Government is trying to –

THE COURT: Ms. Grantland, I mean, this discussion, to me, seems obvious. You are not seeking – we're not talking about sentencing here. If your argument is that the verdict was tainted, that there was bad faith and misconduct, that is a Ninth Circuit issue that's before the Ninth Circuit, and before me is solely resentencing, which the court has required me to engage in, resentencing once I consider the range, which I have done.

[10] And now we've got to go to resentencing. Resentencing is a much more confined set of facts than his preconviction, prejudgment facts, and you're

dealing with things that nave come up since his conviction. I understand that, and those are certainly important. And, as I say, this is an issue that is not easy to deal with. To me, it's a very bright line I've got here.

I can't go wandering into the verdict and make findings that the jury verdict was improper or tainted. That is not my – the Ninth Circuit has jurisdiction over this case, not me, and they've retained, that panel has retained jurisdiction to consider whether or not this is a valid conviction.

That's not my role here. I see my role as much more limited in that regard in terms of this discovery you're asking for, and I just don't think I have that authority.

MS. GRANTLAND: Well, your Honor, when we get to the resentencing, when Mr. Wong and his agents start talking about Government Exhibits 27 and 38-A and the millions of dollars a week Bryan Epis was expecting to make, and the – all these other things that we are claiming are falsified, what are you going to do with that claim? We have –

THE COURT: Well, I'm not going to do –

MS. GRANTLAND: – been hamstrung in our ability to pull out corroborating evidence which would have showed these [11] cops lied about how much supplies they took, because they destroyed it before they testified.

THE COURT: All right.

MR. WONG: Your Honor, the evidence was not destroyed before the agents testified. The evidence was available to the defense for inspection and for use. We invited the defense to look at the evidence, to use any evidence they wanted at trial.

And I also want to state for the record there was no falsified evidence and there was no tainted evidence in his trial.

MS. GRANTLAND: Your Honor –

THE COURT: I haven't gotten –

MS. GRANTLAND: – my client has no reason to expect evidence to be falsified at trial.

THE COURT: I understand that. And, Counsel, you have every right to present that to the Ninth Circuit. You understand that I'm not the Ninth Circuit. And I understand your argument. And what the courts have done consistently with respect to misconduct issues and bad faith issues is they have not permitted that to be considered by the Court in sentencing. And that's fairly clear to me, a very clear teaching of the circuit courts, the reason being that it invades the province of the Ninth Circuit in this case.

You're talking about a tainted verdict. You're talking [12] about false evidence. Now, I can't use – I'm not going to allow you to use false evidence in sentencing anyway. I appreciate that as well. But by the same token, I have a jury verdict, and I'm not going to go behind that verdict, and I'm not allowed to

go behind that verdict at this point. I have to accept that verdict.

It doesn't mean that your hands are tied with the Ninth Circuit. You've made it very clear that you've got serious issues with respect to the verdict in this case, and I understand that you have a very real issue with the extended effect of this conviction.

I don't know as to destruction of evidence. It may not affect it at all; it may affect it dramatically. I don't know that either. That's not before me.

So I want you to understand that I see my role in this case based solely, at this juncture, on the remand from the Ninth Circuit, and that is you consider *Raich* and you resentence the defendant according to the extant law. That's what I've got to do. That's what I intend to do.

So I'm going to, in terms of the discovery, first of all, I don't think that that was a proper order in my case because I don't think I have that authority on the remand. It's very clear I don't have authority. So I'm going to have to withdraw that order, and the issues governing Rule 15 are moot. I don't think that's a proper order in this case [13] because I'm limited by the remand.

So now we're faced with, as I see it, consideration of *Raich*, declaring – the Supreme Court held in *Raich* that the Controlled Substances Act provisions penalizing manufacture of marijuana intrastate, to intrastate growers, and use of marijuana for medical

purposes does not violate the commerce clause and in *Stumpf* and in *Raich* does not affect the condition of this case.

And now I have to go ahead and proceed with resentencing. Now, as I understand it, you're seeking to have – you want an evidentiary hearing at the time of resentencing on the issue of the safety valve; is that correct?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

– – – oOo – – –

BEFORE THE HONORABLE
FRANK C. DAMRELL, JR., JUDGE

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UNITED STATES OF AMERICA, Plaintiff, vs. BRYAN JAMES EPIS, Defendant.	No. CR S 97-381

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REPORTER'S TRANSCRIPT

JURY TRIAL – VOL III

JUL 10, 2002

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REDIRECT EXAMINATION, (Cont'd.)

[1002] BY J. TONY SERRA, Atty at Law:

Q. Mr. Epis, I want to show you Defense Exhibit Number A. It's a collective exhibit with a number of pages.

MR. SERRA: May I approach for that purpose?

THE COURT: You may.

MR. WONG: Your Honor, may we have a sidebar concerning this exhibit?

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(Whereupon there was a reported side-bar discussion.)

THE COURT: What is this?

MR. SERRA: This, your Honor, is this exhibit that was on the computer. This is his first page of 38. It starts here, and we go down – this is the remainder of the exhibit.

He put in two pages, and my client provided to me this morning at approximately 9:00 the rest of the exhibit. And under the doctrine of completion we should be allowed [1003] to have the whole exhibit.

MR. WONG: Your Honor, I move for exclusion under 403.

THE COURT: It's got to be redacted if you are going to get this in here at a minimum. I'm not going to allow that under 403.

What are we getting into?

MR. SERRA: It's part of these originals.

THE COURT: That may be, counsel.

MR. SERRA: He shouldn't be able to pick and choose.

THE COURT: No. I'm not going to allow this. It's all collateral.

MR. SERRA: It was collateral when he put it in. It has nothing to do with the conspiracy to show his intent.

THE COURT: I think under 403 – that's the problem with this case. This is way beyond what it's about. I'm not going to allow the jury to read all about what the city council of San Jose or other cities are doing with marijuana clubs.

What about the first three pages?

MR. SERRA: If I can't get the whole document –

THE COURT: I'm not going to allow all this stuff. If if there is something in this part about the plan or whatever –

MR. SERRA. This is something that he has already.

THE COURT: Well, I'll sustain the objection.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE
FRANK C. DAMRELL, JR., JUDGE

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UNITED STATES OF AMERICA, Plaintiff, vs. BRYAN JAMES EPIS, Defendant.	)	No. CR S 97-381

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JURY TRIAL – VOL III

THURSDAY, JUNE 27, 2002

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[44] THE COURT: The Court is prepared to rule on exhibit 27, Mr. Wong.

Do you have anything further to add?

MR. WONG: Your Honor, I believe the Court's role is as gatekeeper. As long as there is a slight connection to the conspiracy, and I think we have identified things. It's admissible.

THE COURT: It's your intention of mentioning this and showing it to the jury in opening statement?

MR. WONG: I would like to mention it, your Honor. I didn't plan to show it to the jury.

THE COURT: You try your case the way you want to.

[45] Mr. Serra?

MR. SERRA: Yes, your Honor. We persist vigorously in proffering to the Court that it was merely speculation with respect to what all of the clubs ultimately would be selling or presenting to show persons who had recommendations under California State law. It is not in any sense – if you create even the broadest inference it is not a conspiracy which my client had entered into to produce over 1,000 plants.

So our first position is it's irrelevant. Our second position is if you see minimum relevance it's a 403 – it opens up, you know, the whole wide sea. Because my client will or should – he is prepared to and would and should be allowed to explain what it is.

THE COURT: I agree with what you just said. The document is susceptible to more than one explanation. I think it's relevant, but clearly the defendant has the opportunity to explain its meaning. That is for the jury to decide.

Now, in that respect I'm going to allow exhibit 27 into evidence. The Government interprets it one way. The defendant, who prepared the document, gives it another interpretation.

It's my understanding, Mr. Serra, that the defendant prepared this document, the explanation being that he was [46] ruminating or thinking about what could happen if all the potential cannabis clubs that were available were to sell, not just his marijuana, but whoever is available for the sale of marijuana to these cannabis clubs.

Is that his explanation?

MR. SERRA: It's the total projected market to those who had recommendations from doctors to use medical marijuana, and that would entail all clubs. It has nothing really to do with his club and his personal –

THE COURT: I think the defendant is entitled to make that explanation. That doesn't open the door to a medical marijuana defense or a medical necessity. I'm just limiting the testimony to explain the document and that alone, and the case law is pretty clear in that respect.

So this is not an open door to a medical marijuana defense. It just allows the defendant to explain what this document is and what it means.

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